IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

MAUREEN TOFFOLONI, as Administrator and Personal Representative of the ESTATE OF NANCY E. BENOIT, Plaintiff, v. LFP PUBLISHING GROUP, LLC., d/b/a Hustler Magazine, MARK SAMANSKY, an individual, and other distributors and sellers of Hustler Magazine, as Defendants X, Y, and Z, Defendants	Case No. 1:08-CV-00421-TWT

PLAINTIFF'S RESPONSE TO DEFENDANT LFP PUBLISHING GROUP, LLC'S MOTION TO STAY

COMES NOW, Plaintiff, Maureen Toffoloni, as Administrator and Personal Representative of the Estate of Nancy Benoit, (Plaintiff) by and through her undersigned counsel, and hereby responds to Defendant, LFP Publishing Group, LLC d/b/a Hustler Magazine's ("Hustler") Motion to Stay Proceedings as follows:

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I. Introduction

Defendant Hustler has brought its Motion to Stay in an attempt to stall the proceedings in the lower court, continue to unnecessarily delay this case, and inconvenience the Plaintiff. Hustler's Motion to Stay must be denied as neither the filing nor the granting of a petition for certiorari to the Supreme Court operates as an automatic stay, there is no irreparable injury that would be experienced by Hustler, it is unlikely that Hustler's petition will be granted, and even if granted, it is unlikely that the decision of the Court of Appeals will be reversed.

II. Argument

The filing of a petition for certiorari does not act as a stay of the decision of the lower court being appealed. See Barnes v. E-Systems, Inc. Group Hosp. Medical & Surgical Ins. Plan, 501 U.S. 1301, 1302 112 S.Ct. 1, 2 (1991) *"a stay issues not of right but pursuant to sound equitable discretion."*

Instead, the decision of whether to stay the proceeding rests either with the discretion of the lower court, or a Justice of the Supreme Court upon a specific application pursuant to 28 U.S.C. §2101(f). Because Hustler has not made such an application to the Supreme Court in this case, the decision to stay these proceedings rests wholly with this Court. There are many public policy reasons why such a stay must be considered on a case by case basis. If the mere filing of a petition for certiorari guaranteed an automatic stay of the lower court's decision, every losing party would file such a petition, unnecessarily flooding the Supreme Court with frivolous petitions and grinding all lower court proceedings to a standstill. The judicial system could not function effectively, or efficiently in such a system. Stays of a lower court's decision are not automatically granted specifically to allow the Supreme Court to consider only those petitions with merit, and also to prevent parties from having to unnecessarily wait for months, or even years, for the judgments of the lower courts to be implemented.

The Court must consider three separate criteria in evaluating whether to grant a stay pending a petition for certiorari: (1) there must be a reasonable probability that the petition for certiorari will be granted; (2) there must be a significant possibility of reversal of the lower court's decision; and (3) there must be a likelihood that irreparable harm will result if that decision is not stayed. *See* Times-Picayune Pub. Corp. v. Schulingkamp, 419 U.S. 1301, 1305, 95 S.Ct. 1, 4 (1974). Because Hustler cannot show that even one of these elements is met, let alone all three, its Motion to Stay these proceedings must be denied.

A. **Hustler Cannot Show a Reasonable Probability that Certiorari Will be Granted, or A Significant Possibility That the Court of Appeals' Decision Would be Reversed.**

During the previous Supreme Court term, some 8,241 petitions for certiorari were filed, and of these approximately 1.1%, less than 100 petitions, were granted. *See* Caperton v. A.T. Massey Coal Co., Inc.,129 S.Ct. 2252, 2272 (2009). Of those that are granted, some of the decisions of the lower courts are affirmed. Therefore, Hustler is, in effect, asking this Court to stay all proceedings based on less than a 1% chance of the Supreme Court granting certiorari and reversing the unanimous *en banc* judgment of the Eleventh Circuit Court of Appeals ("the Panel"). This cannot qualify as a "reasonable probability" necessary to justify a stay of lower court proceedings.

In addition, the Supreme Court has, already, directly addressed the issue of the validity of a state cause of action for violation of the right of publicity and its compatibility with the First Amendment. *See* Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 97 S.Ct. 2849 (1977). In *Zacchini*, the plaintiff, an entertainer, brought an Ohio right of publicity tort action against a broadcasting company that broadcast the plaintiff's act in its entirety without permission. The

Ohio Supreme Court found that the *"TV station has a privilege to report in its newscasts matters of legitimate public interest which would otherwise be protected by an individual's right of publicity, unless the actual intent of the TV station was to appropriate the benefit of the publicity for some non-privileged private use, or unless the actual intent was to injure the individual."* Zacchini v. Scripps-Howard Broadcasting Co., 47 Ohio St.2d 224, 235 (1976). The United States Supreme Court reversed the decision of the Ohio Supreme Court, holding that the *"First and Fourteenth Amendments do not immunize the media when they broadcast a performer's entire act without his consent,"* and that a state cause of action for right of publicity did not conflict with the freedom of speech and the press guaranteed by the Constitution. Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 575, 97 S.Ct. 2849, 2857 (1977). Just like the case at hand, *"petitioner's complaint [in Zacchini] was grounded in state law and that the right of publicity which petitioner was held to possess was a right arising under Ohio law."* Id., at 566, 2853 (1977). In addition, mirroring the Panel's holding in this case, the Court in Zacchini held that a news broadcast or publication can not confiscate and broadcast a valuable commodity under the guise of newsworthiness. Plaintiff may have been powerless to keep Hustler from discussing in an article about Nancy Benoit's life and career that she aspired at one time to be a model. However, the actual images are the property of Ms. Benoit and her successors, and so may not be shown without permission and compensation. The instant case provides no additional insight into First Amendment law that was not already discussed in Zacchini. Therefore, it is highly unlikely that the Supreme Court will grant certiorari. Because the theories of law in this case have already been decided by the Supreme Court, that Court will not wish revisit the issue.

In addition, the conflicts enumerated by Hustler between the Panel's decision and past United States Supreme Court and Georgia Supreme Court case law are not as substantial as portrayed, making it less likely that the Petition will be granted and, if granted, less likely that the Court of Appeals' decision will be overturned.

Hustler's characterization that the Georgia Supreme Court's holding in Waters v. Fleetwood, 212 Ga. 161 (1956) is inconsistent with the Panel's decision in this case, is erroneous. The Panel clearly stated in its opinion that Waters is distinguished from this case, as the photograph used in the news article in Waters was directly related to the newsworthiness of the article. In contrast, in the instant case, the photographs used in the Hustler publication bore absolutely no relation to the "incident of public interest," i.e. Nancy Benoit's death. *See* Order, p. 19. The Panel's decision does not contradict the Waters case whatsoever, and Hustler does not point to any other specific Georgia cases in its Motion to Stay that may conflict with the Panel's ruling.

Hustler also erroneously states that the Panel's decision conflicts with Supreme Court cases of Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 97 S.Ct. 2849 (1977) and Time v. Hill, 385 U.S. 374, 87 S.Ct. 534 (1967). The Panel's opinion, based on the tort of right of publicity, stemming from the right to privacy, is in perfect accordance with Zacchini, as discussed above. Likewise, the Panel's decision is compatible with the Supreme Court's decision in Time, in that the speech being scrutinized must relate to the newsworthy event. In Time, the complained of speech related directly back to the newsworthy event, even though that event occurred several years earlier. In this case, the photographs do not relate in any way to the newsworthy event of Ms. Benoit's death. The fact that there is no direct conflict, with either state or federal case law, is indicative of the fact that it is extremely unlikely that the Supreme Court will grant certiorari in this case.

Finally, the unanimity of the Panel's decision, as well as the denial of Hustler's Motion for Rehearing En Banc, indicates that it is unlikely that the Supreme Court will grant Hustler's petition. The Panel produced a unanimous opinion, and no Eleventh Circuit Court of Appeals judge in regular active service requested that the court be polled on rehearing en banc. Had there been a split in the decision, Hustler would have at least some grounds to indicate a controversy that could be revisited by the Supreme Court. However, there is no indication of any alternative view of the Panel's decision, and therefore no substantial evidence that Hustler's petition for certiorari will be granted.

B. Hustler Cannot Show Irreparable Injury

Even if Hustler can show a reasonable probability that the petition for certiorari will be granted, as well as a significant possibility of reversal of the Eleventh Circuit's decision, which it can not, Hustler must also show that it would experience irreparable injury from the denial of the stay. *See* Ruckelshaus v. Monsanto Co., 463 U.S. 1315, 1317 (1983). *"An applicant's likelihood of success on the merits need not be considered, if the applicant fails to show irreparable injury from the denial of the stay."*

If the case proceeded to trial in the lower court, and Plaintiff successfully recovered monetary damages, Hustler would be entitled to seek the restoration of the status quo in the unlikely event that Hustler's petition for certiorari is granted and the Panel's judgment is overturned. *See* Porter v. Lee, 328 U.S. 246, 251 (1946). However, if this case is stayed, and delayed for months or even years, Plaintiff will have no recourse against Hustler for the unnecessary delay, inconvenience, and increased litigation costs incurred in fighting the Defendant's frivolous motions.

This case does not involve any issue which, if continued to be litigated in the lower court, would cause Hustler's petition for certiorari to become moot. Regardless of the outcome in the lower court, the United States Supreme Court could still grant Hustler's petition and rule on the merits of the appeal if it so chose, so that no irreparable injury can occur to Hustler should the Motion to Stay be denied.

Hustler presents no justification as to why the monetary risk that it may experience during discovery or trial should take greater precedent over the very likely danger of irreparable harm and fundamentally unfair treatment that would be experienced by Plaintiff, should the proceedings in the lower court be stayed for months or even years for no valid reason. Plaintiff originally filed her claim on February 5, 2008, over a year and a half ago. Plaintiff should not be made to wait another year and a half to be able to close this tragic chapter of her life, as well as the lives of other family members, and move on. In addition to the delay, Plaintiff has incurred tremendous additional expense in responding to Hustler's baseless motions throughout this case. The lower court proceedings must continue to ensure fairness among the parties.

C. This Court Should Not Allow Hustler to Lead it into Error Once Again.

Defendant Hustler has already delayed these proceedings unnecessarily with its groundless Motion to Dismiss, and now attempts to do so, again, with its Motion to Stay. The Eleventh Circuit carefully reasoned in its opinion that the Defendant's Motion to Dismiss was without merit, and that Hustler's actions are a clear violation of the Plaintiff's right of publicity. There is no basis for this Court to question the ruling of the Panel by granting Hustler's Motion to Stay pending its petition for certiorari, especially when there is no indication that the Supreme Court is likely to grant that petition, let alone reverse the Court of Appeals' decision.

Hustler gives no indication in its Motion to Stay as to when its petition for certiorari will be submitted. By statute, Hustler has 90 days from the date of the Eleventh Circuit's denial of rehearing. *See* Supreme Court Rule 13.1. The fact that Hustler does not give a reliable timetable for the submission of its petition indicates a motivation to stall these proceedings, harass the Plaintiff, and increase litigation costs to Plaintiff, rather than the desire to have the Supreme Court review this case. As such, this Court must deny Hustler's Motion to Stay.

III. Conclusion

Defendant Hustler cannot show a reasonable probability that its petition for certiorari to the United States Supreme Court will be granted, or that there is a significant possibility of reversal of the Panel's decision. In addition, Hustler can not show a likelihood that irreparable harm will result for the denial of its Motion to Stay. Because Defendant Hustler cannot satisfy any of these requisite elements, and because Hustler has shown a desire to needlessly delay these proceedings in the past, Plaintiff respectfully requests that Defendant's Motion to Stay these proceedings be DENIED.

Respectfully submitted this 22nd day of September, 2009

/s/ Richard P. Decker
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CERTIFICATION OF COUNSEL

Pursuant to N.D. Ga. Local Rule 7.1D, I hereby certify that this document is submitted in Times New Roman 14 point type as required by N.D. Ga. Local Rule 5.1B.

/s/ Richard P. Decker
RICHARD P. DECKER

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

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CERTIFICATE OF SERVICE

This is to certify that today, September 22, 2009, I have electronically filed the foregoing *Plaintiff's Response to Defendant LFP Publishing Group LLC's Motion to Stay* with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorney(s) of record:

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